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No. 99-557

In the Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, PETITIONER

v.

CATHERINE NATSU LANNING, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

BILL LANN LEE
Acting Assistant Attorney General

DENNIS J. DIMSEY
ROBERT S. LIBMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Under Title VII of the Civil Rights Act of 1964, as amended by Section 105 of the Civil Rights Act of 1991, an employment practice with a disparate impact on the basis of sex is unlawful unless the employer demonstrates that the challenged practice is "job related for the position in question and consistent with business necessity." 42 U.S.C. 2000e-2(k)(1)(A)(i). The question presented is whether, to establish that a cutoff score on an entry-level employment examination with a disparate impact on women is "consistent with business necessity," the employer must show that the cutoff score measures "the minimum qualifications necessary for successful performance of the job in question."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 181 F.3d 478. The findings of fact and conclusions of law of the district court (Pet. App. 46a-161a) and its order (Pet. App. 162a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1999. The petition for writ of certiorari was filed on September 27, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case presents a disparate-impact challenge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to a portion of the entry-level test administered by petitioner for the position of transit police officer. Petitioner is the regional mass transit authority operating the system of subways, buses, and elevated trains in the Philadelphia area. Pet. App. 4a. The challenged test is part of the second component of a multiple-step selection process for entry-level transit police officers. See *id.* at 77a.

The first component of the selection process is a written test. Applicants who pass the written test are invited to participate in the physical examination, which includes a running test as well as other tests designed to evaluate applicants' physical fitness. Pet. App. 76a-77a. Applicants must be able to run 1.5 miles in 12 minutes or less to proceed further in the selection process. *Id.* at 77a. Applicants who pass the running test proceed to an oral interview. Applicants receive a numerical score on the oral interview and are placed on an eligibility list in rank order based solely on the oral interview score; their rankings on the physical fitness tests have no bearing on their ranking on the eligibility list. *Id.* at 77a-78a.

Petitioner adopted the running test in 1991 on the recommendation of Dr. Paul Davis, an exercise physiologist that it retained to develop a physical fitness test for transit police officers. Pet. App. 4a. Dr. Davis conducted a job analysis to determine the physical abilities necessary to perform the job of a police officer in petitioner's transit system. That job analysis consisted of a study with twenty experienced incumbent transit police officers, designated "subject matter ex-

perts" (SMEs). *Ibid.* In response to questions about the most arduous tasks they may be required to perform, the SMEs estimated that a transit police officer in petitioner's system should be able to run one mile in full gear in 11.78 minutes. *Id.* at 5a. That time corresponds to the ability to run 1.5 miles in 15 minutes and 40 seconds, or an aerobic capacity of approximately 33.5 ml/kg/min. See Pet. 4 n.4.[1] Dr. Davis rejected the SMEs' estimate of the minimum qualifications necessary to perform their job, and instead recommended that petitioner require that applicants be able to run 1.5 miles in 12 minutes, which corresponds to an aerobic capacity of 42.5 ml/kg/min. Pet. App. 22a.

In administrations of the entry-level 1.5 mile running test in 1991, 1993, and 1996, 10 out of 83 female test-takers passed the test, for an overall female pass rate of 12.1%. Pet. App. 87a. During the same three years, 643 out of 1080 male test-takers passed, for an overall male pass rate of 59.5%. *Ibid.* The disparity between the overall female and male pass rates for these years amounts to 5.56 standard deviations. *Ibid.* As of July 1997, only 16 of petitioner's 234 uniformed officers were women. *Id.* at 7a, 87a.

Since 1991, petitioner has required all incumbent transit police officers to take a physical fitness test every six months. Like the entry-level test, the test for incumbents requires officers to demonstrate an aerobic capacity of 42 ml/kg/min. Pet. App. 92a. Between 1991 and 1997, numerous incumbent SEPTA officers failed the aerobic capacity test. *Id.* at 94a. Petitioner was unable to identify any instance in which an incumbent

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[1] Aerobic capacity is the ability of the body to utilize oxygen. The unit of measurement for aerobic capacity is milliliters of oxygen per kilogram of body weight per minute, or ml/kg/min.

officer who failed the test was unable to perform the physical requirements of the job, and in fact petitioner has promoted and commended many of those officers, and has never removed or disciplined any officer for failing to perform the physical requirements of the job. *Id.* at 7a, 98a.

2. In 1997, five women who were rejected for employment by petitioner because they failed to complete the 1.5 mile run in 12 minutes or less filed a class action, alleging that the test discriminated against them on the basis of sex in violation of Title VII. The individual plaintiffs alleged, among other things, that the running test had an unlawful disparate impact on the basis of sex, in violation of Title VII, as amended by Section 105 of the Civil Rights Act of 1991 (1991 Act), see 42 U.S.C. 2000e-2(k). The United States filed a separate suit against petitioner under the "pattern or practice" provisions of Title VII, see 42 U.S.C. 2000e-6, also alleging that petitioner's running test had an unlawful disparate impact against women. The district court consolidated the two cases. See Pet. App. 46a-49a.

After trial, the district court found that petitioner's running test has a "severe" adverse impact against female applicants for the position of transit police officer. Pet. App. 130a. The district court nevertheless concluded (*id.* at 131a, 150a) that petitioner had demonstrated that its running test is "job-related and consistent with business necessity" under the standards governing disparate-impact claims under Title VII, as amended by the 1991 Act, see 42 U.S.C. 2000e-2(k)(1)(A)(i).

In reaching that conclusion, the district court relied (Pet. App. 128a-129a) on this Court's discussion of disparate-impact claims in *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 587 n.31 (1979). In

particular, the district court held that *Beazer* "implicitly approves employment practices that significantly serve, but are neither required by nor necessary to, the employer's legitimate business interests." Pet. App. 129a. The court rejected (*id.* at 127a-129a) the United States' contention that the 1991 Act requires petitioner to demonstrate that the cutoff score on the running test is "necessary to safe and efficient job performance," as that phrase was used to describe the employer's burden in disparate-impact cases in *Dothard* v. *Rawlinson*, 433 U.S. 321, 331 n.14 (1971).

3. A divided panel of the court of appeals concluded that the district court had applied an incorrect legal standard with respect to petitioner's burden of demonstrating that the cutoff score on its running test is "consistent with business necessity" under Title VII as amended by the 1991 Act. Pet. App. 17a-25a. The court of appeals remanded the case for the district court to evaluate the record under the proper standard, and expressly allowed the district court to exercise its discretion to permit supplementation of the record for analysis under the correct standard. *Id.* at 25a-26a.

a. The court first observed (Pet. App. 13a-14a) that the statutory language at issue ("consistent with business necessity") was added to Title VII by the 1991 Act, which was enacted in response to this Court's decision in *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), explicating the standards governing disparate-impact suits under Title VII. The 1991 Act expressly provides that it is intended "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove*[.]" See Pet. App. 13a-14a (quoting Civil Rights Act of 1991,

Pub. L. No. 102-166, § 3, 105 Stat. 1071). In addition, an interpretive memorandum accompanying the 1991 Act and expressly referred to in Section 105(b) of the 1991 Act, see 105 Stat. 1075, states that "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove*[.]" Pet. App. 14a (quoting 137 Cong. Rec. 28,680 (1991)).

Based on the statutory amendments made in 1991 and the interpretive memorandum, the court of appeals concluded that "Congress intended to endorse the business necessity standard enunciated in *Griggs* and not the *Wards Cove* interpretation of that standard. By Congress' distinguishing between *Griggs* and *Wards Cove*, we must conclude that Congress viewed *Wards Cove* as a significant departure from *Griggs*." Pet. App. 15a. The court of appeals also remarked (*id.* at 12a-13a n.11) that the language from *Beazer* relied on by the district court (see *id.* at 128a-129a) was "dicta," and that that language, as well as similar language in a plurality opinion in *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988), while "clearly foreshadow[ing] the Court's holding in *Wards Cove*," was never "embraced by a majority of the Court as the binding standard for business necessity prior to *Wards Cove*."

In considering the standard for business necessity "most consistent with *Griggs* and its pre-*Wards Cove* progeny," the court stated that the "laudable mission begun by the Court in *Griggs*" was "the eradication of discrimination through the application of practices fair in form but discriminatory in practice by eliminating *unnecessary* barriers to employment opportunities." Pet. App. 16a. "In the context of a hiring exam with a

* * * discriminatory effect," the court concluded, "the standard that best effectuates this mission is implicit in the Court's application of the business necessity doctrine to the employer in *Griggs*" itself. *Ibid.* That standard, the court held, is that "a discriminatory cutoff score is impermissible unless shown to measure the minimum qualifications necessary for successful performance of the job in question." *Ibid.*

The court found its conclusion reinforced by both *Dothard* and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). In *Albemarle*, the court noted, this Court explained that discriminatory tests must be validated to show that they are " 'predictive of . . . important elements of work behavior which comprise . . . the job . . . for which candidates are being evaluated' and that the scores of the higher level employees do not necessarily validate a cutoff score for the minimum qualifications to perform the job at an entry level." Pet. App. 17a (quoting *Albemarle*, 422 U.S. at 431, 434). Similarly, in *Dothard*, the Court observed that a discriminatory cutoff score on an entry-level examination "must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." Pet. App. 17a (quoting *Dothard*, 433 U.S. at 332 n.14).

The court also stressed that, in the 1991 Act, Congress required that an employer show both that a challenged test be "job related" and that the test be "consistent with business necessity," and it remarked that "[j]udicial application of a standard focusing solely on whether the qualities measured by an entry level exam bear some relationship to the job in question would impermissibly write out the business necessity prong of the Act's chosen standard." Pet. App. 17a. In addition, the court noted that the disparate-impact theory of discrimination addresses the possibility that

an employer's job requirements may be "based not upon necessity but rather upon historical, discriminatory biases," and it suggested that "[a] business necessity standard that wholly defers to an employer's judgment as to what is desirable in an employee therefore is completely inadequate in combating covert discrimination based on societal prejudices." *Id.* at 18a.

The court rejected (Pet. App. 19a n.16) the dissent's suggestion that the standard it articulated ("minimum qualifications necessary for successful performance of the job in question") should not apply in this case because petitioner's transit police officer jobs implicate issues of public safety. The standard itself takes public safety into consideration, the court stated, because an "officer who poses a significant risk to public safety could not be considered to be performing his job successfully." *Id.* at 20a n.16.

The court of appeals further concluded that the district court had not evaluated the facts under the proper legal standard. The court of appeals again noted that the district court had relied heavily on language from *Beazer* which "is dicta" and "mirrors the standard adopted by *Wards Cove*" but rejected by Congress in the 1991 Act. Pet. App. 20a. In addition, the court of appeals suggested that the district court had relied too uncritically on Dr. Davis' "expertise" in establishing the cutoff for the running test, in conflict with this Court's teachings in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), *Albemarle*, and *Dothard* that the employer's "judgment alone is insufficient to validate an employer's discriminatory practices." Pet. App. 21a-22a. "More fundamentally, however," the district court had never considered whether the cutoff recommended by Dr. Davis and established by petitioner "reflects the minimum aerobic capacity necessary to perform suc-

cessfully the job" of transit police officer. *Id.* at 22a. The court of appeals therefore remanded the case to the district court "to determine whether [petitioner] has carried its burden of establishing that its 1.5 mile run measures the minimum aerobic capacity necessary to perform successfully the job" of transit police officer. *Id.* at 25a. The court also allowed the district court to exercise its discretion to permit supplementation of the record on that point. *Id.* at 25a-26a.

b. Judge Weis dissented. Pet. App. 27a-45a. He concluded that "the standard for business justification as set forth by the Civil Rights Act of 1991 * * * remains essentially the same as it was in the pre-*Wards Cove* era," but he also suggested that "*Wards Cove* was not a revolutionary pronouncement" and "[t]he definition and application of the appropriate standard for business justification will depend on the context in which it is raised." *Id.* at 35a. In this case, he continued, there is "an additional important consideration–public safety," *ibid.*, and he would have followed a line of cases decided before the 1991 Act "recogniz[ing] the relevance of safety considerations" in evaluating a defense of business necessity, see *id.* at 36a. "Reducing standards towards the lowest common denominator is particularly inappropriate for a police force," Judge Weis stressed, because "[n]o matter how laudable it is to reduce job discrimination, to achieve this goal by lowering important public safety standards presents an unacceptable risk." *Id.* at 41a. Further, he suggested that petitioner should prevail even under the *Dothard* standard, because the district court had stated that "physical fitness * * * is necessary for and critical to the successful performance of the job" of transit police officer. *Id.* at 42a. That finding, he concluded, "clearly meets even the [majority's] criterion that cut-off scores

'measure the minimum qualifications necessary for *successful performance* of the job.'" *Id.* at 43a (emphasis added in Judge Weis's opinion).

ARGUMENT

Petitioner argues that the court of appeals erred in concluding that, to establish the defense to a disparate-impact claim that a cutoff score on a job selection examination is "consistent with business necessity," the employer must show that the cutoff score measures "the minimum qualifications necessary for successful performance of the job in question." Further review on that question is not warranted in this case. The court of appeals' decision is interlocutory. The decision also does not conflict with any decision of any court of appeals. Moreover, the court of appeals did not apply its interpretation of the business necessity defense to the facts of this case, and this Court would benefit from further elaboration of that concept in the lower courts. In addition, the court of appeals was clearly correct in concluding that the 1991 Act rejected the formulation of the defense of business justification in the *Wards Cove* decision.

1. This case does not present an appropriate vehicle for review of the question presented, at least in its present posture, because the decision of the court of appeals is interlocutory. This Court ordinarily does not grant review of interlocutory decisions of the courts of appeals. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying petition for certiorari because court of appeals had remanded the case and the case was thus not ripe for review); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases," review on certiorari is reserved for

final judgments); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari).

In this case, the court of appeals did not direct that judgment be entered for respondents. Rather, the court of appeals remanded the case to the district court for application of the appropriate legal standard to the facts and, if appropriate, further development of the record. Pet. App. 25a-26a. Petitioner may therefore obtain a favorable final judgment on further proceedings, in the district court on that court's reexamination of the record under the legal standard articulated by the court of appeals, or in the court of appeals if a further appeal is taken from the decision of the district court. In either event, petitioner's objection to the legal standard articulated by the court of appeals would become moot. On the other hand, if petitioner does not prevail on further proceedings, it may again seek this Court's review once final judgment is entered.

2. Review is not warranted because the decision below is the only appellate decision that has directly addressed the specific question presented here, *viz.*, the meaning of the statutory phrase "consistent with business necessity" in 42 U.S.C. 2000e-2(k)(1)(A)(i), as amended by the Civil Rights Act of 1991, in the context of a selection device such as an examination required for an entry-level position. Petitioner contends (Pet. 16 n.13) that five other circuits have addressed the standard of business necessity under the 1991 Act without suggesting that the standard is limited to requiring minimum qualifications for successful job performance. Those decisions, however, do not specifically address the meaning of "consistent with business necessity" and in any event do not conflict with the decision of the court of appeals in this case.

In *Fitzpatrick* v. *City of Atlanta*, 2 F.3d 1112, 1117 n.5 (11th Cir. 1993), the court upheld the City of Atlanta's requirement that city firefighters be clean-shaven against a challenge that the requirement has a disparate impact based on race (many black men have a skin condition that makes close shaving impossible or painful). The court did not, however, engage in any analysis of the textual phrase "consistent with business necessity" nor consider its relation to the phrase "job related for the position in question." Moreover, although the court upheld the challenged practice in that case, it also stressed that in disparate-impact cases under the 1991 Act standards, "the defendant [must show] that the practice or action is *necessary* to meeting a goal that, as a matter of law, qualifies as an important business goal for Title VII purposes." *Id.* at 1118 (emphasis added); see *id.* at 1119 ("[m]easures *demonstrably necessary* to meeting the goal of ensuring worker safety" may satisfy business necessity standard) (emphasis added); *id.* at 1119 n.6 (noting that in pre-*Wards Cove* cases, "employers [were] required to present convincing expert testimony demonstrating that a challenged practice *is in fact required* to protect employees or third parties from documented hazards") (emphasis added).

In addition, the court stated in *Fitzpatrick* that, while in *Wards Cove*, this Court "broadened the scope of the necessity defense by holding that practices causing a disparate impact were permissible, even if they could not be shown to be absolutely necessary, so long as they 'served, in a significant way, the legitimate employment goals of the employer,'" that change from previous law, among others, was "statutorily reversed" by Congress in the 1991 Act. 2 F.3d at 1117 n.5 (quoting *Wards Cove*, 490 U.S. at 659). The *Fitzpatrick*

decision is therefore consistent with the court of appeals' conclusions in this case that the 1991 Act changed the business necessity standard from that articulated in *Wards Cove* and that in a disparate-impact case, the employer must show that its challenged practice is "necessary" to successful job performance. See Pet. App. 12a-15a (discussing *Dothard*, *Wards Cove*, and 1991 Act).

In *Smith* v. *City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996), the court upheld, against a disparate-impact claim brought under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, a requirement that firefighters exhibit either a certain percentage use of lung capacity or a certain minimum aerobic capacity, as measured in physical examinations and simulations, to be approved to wear a breathing apparatus deemed necessary for firefighting. That decision also is consistent with the decision below. In *Smith*, the Eighth Circuit decided the case on the assumption that "the pre-*Wards Cove* standard" governed the disparate-impact claim, see 99 F.3d. at 1471, and it described that standard as whether the challenged job qualification "is necessary to safe and effective job performance," *ibid.*, a phrase it drew from *Dothard*. The court upheld the aerobic capacity requirement challenged in that case because the evidence showed that the requirement "was the minimum required to allow the firefighters to complete the simulation [of actual firefighting] successfully." *Id.* at 1472. It is therefore likely that the *Smith* case would have been decided the same way in the Third Circuit, which described the employer's burden in similar terms, to show that a challenged practice measures "the

minimum qualifications necessary for successful performance of the job in question." Pet. App. 16a.[2]

In the three other post-*Wards Cove* decisions cited by petitioner, the courts conducted no analysis of the business necessity language added by the 1991 Act. *Allen* v. *Entergy Corp.*, 181 F.3d 902 (8th Cir. 1999), concerned only whether the challenged practice was "sufficiently related to the specific jobs the plaintiffs sought," *id.* at 904, a requirement that is, as we have explained, distinct from the statutory requirement that the challenged practice be "consistent with business necessity," and the court did not address the question whether a passing score on the challenged test was "necessary" for job performance. In *NAACP* v. *Town of East Haven*, 70 F.3d 219 (2d Cir. 1995), decided on appeal from the denial of a preliminary injunction, the court of appeals did not itself evaluate any challenged

[2] This Court has not decided whether a disparate-impact claim may be stated at all under the ADEA, nor (if such a claim may be stated) whether it should proceed under the *Wards Cove* standard, the test adopted by the 1991 Act (which did not expressly amend the ADEA with respect to disparate-impact claims), or some other test. See *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993); *Smith*, 99 F.3d at 1469-1471. The Eighth Circuit observed in *Smith*, moreover, that its more recent cases had decided ADEA disparate-impact claims under the *Wards Cove* standard, and it decided the *Smith* case only assuming, and not deciding, that pre-*Wards Cove* law should be applied. See *id.* at 1470-1471. The Eighth Circuit has since then again stated that the question whether *Wards Cove* or some other standard should be applied in ADEA disparate-impact cases is unsettled in that Circuit. See *Allen* v. *Entergy Corp.*, 193 F.3d 1010, 1014 (1999). It would be particularly inappropriate to grant review in this Title VII case based on asserted conflict with an ADEA disparate-impact case from the Eighth Circuit, when this Court has not decided whether ADEA disparate-impact suits may proceed at all, and the Eighth Circuit has not decided what standards govern such suits.

practice but rather admonished the district court to make specific findings of fact and conclusions of law as to the job requirement in question, *id.* at 223-225, and set forth in summary fashion the standards to be applied by the district court on remand, *id.* at 225; the court did not discuss the meaning of "consistent with business necessity" under the 1991 Act. In *Association of Mexican-American Educators* v. *State of California*, Nos. 96-17131 and 97-15422, 1999 WL 976720 (9th Cir. Oct. 28, 1999), the court upheld, against a disparate-impact challenge, a requirement that public-school teachers "demonstrate basic reading, writing and mathematics skills in the English language as measured by a basic skills proficiency test." See *id.* at *1. The court did not elaborate on the meaning of "consistent with business necessity," except to observe that Title VII requires that cutoff scores on selection devices such as proficiency examinations have some "independent basis," such as a "professional estimate of the requisite ability levels" that is fairly reflected in the cutoff scores. See *id.* at *18. Furthermore, in that case the court upheld as not clearly erroneous the district court's finding that the cutoff scores "reflect[ed] reasonable judgments about the minimum levels of basic skills competence that should be required of teachers." *Id.* at *19. That finding is consistent with the standard articulated by the court of appeals in this case, that a cutoff score must measure "minimum qualifications necessary for successful performance," Pet. App. 16a.

Petitioner also observes (Pet. 16 n.12) that, before this Court's decision in *Wards Cove*, the lower courts had issued many decisions concerning the concept of "business necessity" under the disparate-impact theory of Title VII, and it contends that these decisions did not require that an employer show that a challenged selec-

tion device measure only "minimum qualifications" for successful performance. Those cases, however, are inapposite because they are not addressed to the specific showing that an employer must make under the terms of the 1991 Act once a selection device has been shown to have a disparate impact. While the appellate decisions before *Wards Cove* are perhaps of use in explaining the background to Congress's amendment of Title VII in 1991, they concern different statutory language and therefore cannot definitively resolve the specific question presented in this case.

3. Petitioner and its amicus argue that the court of appeals' decision will require employers to reduce their selection standards to the "lowest common denominator" (Pet. 17) (emphasis omitted) or require only that employees perform "at a marginally acceptable level" (Amicus Br. 12). We do not find any such requirement in the court of appeals' decision. Although the court of appeals stated that selection criteria such as cutoff scores challenged under a disparate-impact theory must measure "minimum standards," it also made clear that those standards govern "*successful* performance" of the job in question. Pet. App. 16a, 17a (emphasis added). The element of "successful performance" is as important to the court of appeals' decision as the reference to "minimum standards." That element was also found in this Court's disparate-impact cases even before *Wards Cove*. See *Griggs*, 401 U.S. at 431 (challenged selection criteria must "bear a demonstrable relationship to successful performance of the jobs for which [they are] used").

Petitioner also argues that the court of appeals inappropriately discounted the significance of public safety in a position such as a transit police officer. Pet. 18-19. That contention is incorrect. The concept of

"successful performance" in a position such as transit police officer plainly includes safety considerations, and the court of appeals made quite clear that the business necessity standard "itself takes public safety into consideration" where appropriate. Pet. App. 20a n.16. The court also emphasized that a transit officer "who poses a significant risk to public safety could not be considered to be performing his job successfully." *Ibid.* While the court of appeals declined to rely on cases decided before *Wards Cove* and the 1991 Act that had seemingly applied a distinct disparate-impact analysis to public-safety positions, see *id.* at 19a-20a n.16, those cases did not involve the statutory language added by Congress in 1991, and the court of appeals properly observed that its task was to apply the statute as amended, rather than a line of cases decided under an earlier version of the statute, see *ibid.* The court's decision not to rely on that line of cases does not at all suggest, however, that legitimate public safety considerations are irrelevant to Title VII disparate-impact cases arising under the 1991 Act's standards, or that the court of appeals' standard "intentionally ignores public safety considerations," as petitioner erroneously asserts (Pet. 19).

In addition, this Court would benefit from further elaboration and percolation in the lower courts of the concept of "minimum qualifications for successful performance," especially in the context of selection devices such as cutoff scores on examinations. The court of appeals' decision in this case has a necessarily somewhat abstract quality, because it did not apply its legal analysis to the facts of this case. Although the court of appeals did exhibit skepticism about some of the evidence put forward by petitioner to evaluate its aerobic capacity requirement, it did not hold that peti-

tioner's requirement was not "consistent with business necessity," nor did it rule that any of the district court's findings of fact was clearly erroneous. Rather, the court of appeals remanded the case to the district court for reevaluation of the record under the appropriate legal standard.

4. The court of appeals' decision is consistent with Congress's intent in the 1991 Act to return the standards governing disparate-impact claims to the state of the law before *Wards Cove*. In enacting Section 105 of the 1991 Act, Congress stated that one of its purposes was "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)." Pub. L. No. 102-166, § 3, 105 Stat. 1071.[3] This Court's decisions before *Wards Cove* had stated that, to survive a disparate-impact challenge, a selection criterion must be "necessary" to a legitimate employment objective (as well as being "related" to the requirements of the position). The court of appeals thoroughly analyzed this Court's decisions applying the business necessity concept and arrived at a standard consistent with those decisions.

In *Griggs*, the Court stated that Title VII requires "the removal of artificial, arbitrary, and *unnecessary* barriers to employment" that have a disparate impact

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[3] The interpretive memorandum designated as the exclusive legislative history of the Act with respect to "business necessity," Pub. L. No. 102-166, § 105(b), 105 Stat. 1075, similarly states that "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs* * * * and in the other Supreme Court decisions prior to *Wards Cove*." 137 Cong. Rec. 28,680 (1991).

on the basis of race and sex. 401 U.S. at 431 (emphasis added). The Court also noted that incumbent employees who had not taken the tests challenged in that case had continued to perform satisfactorily and even to be promoted, which "suggest[ed] the possibility that requirements [might] not be needed" even to permit advancement within the company. *Id.* at 432. The Court therefore required employers to show that employment practices with a disparate impact on the basis of race or sex are closely related to job performance, and explained that the "touchstone" of that requirement is "business necessity." *Ibid.*

This Court reaffirmed the requirement that a selection criterion be "necessary" the employer's legitimate business objectives in subsequent cases. In *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), the Court clarified that, to survive a Title VII challenge, an employment practice with disparate impact "must be shown to be necessary to safe and efficient job performance." *Id.* at 332 n.14. Similarly, in *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 143 (1977), the Court held that a facially neutral policy that imposes a greater burden on women violates Title VII unless the "company's business necessitates the adoption" of that policy; see also *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 336 n.15 (1977) (under disparate impact analysis, practices that fall more harshly on one group must be "justified by business necessity"). And in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 434 (1975), the Court held that a general-ability examination had not been properly validated by the employer as a selection criterion for new employees, and observed that "[t]he fact that the best of [the] employees working near the top of a line of progression score well on a test does not necessarily mean that that test, or some particular

cutoff score on the test, is a permissible measure of the minimal qualifications of new workers entering lower level jobs." Those decisions support the court of appeals' conclusion that a challenged cutoff score on a selection examination, to be shown to be necessary to legitimate employment goals, must measure minimum qualification for successful job performance.

In *Wards Cove*, however, the Court ruled that an employer may successfully defend a challenged practice against a disparate-impact claim by showing that the practice "serves, in a significant way, the legitimate employment goals of the employer." 490 U.S. at 659. The Court also held that the "touchstone" of the inquiry is "a reasoned review of the employer's justification for his use of the challenged practice" rather than a requirement that a challenged practice be "essential" or "indispensable" to the employer's business. *Ibid.* The Court even abandoned the term "business necessity" used in its prior cases, and instead referred to a "business justification" as a defense against a disparate-impact claim. See *id.* at 658; see also *Allen* v. *Seidman*, 881 F.2d 375, 377 (7th Cir. 1989) (noting that prior to *Wards Cove*, employer was required to show that "practice was necessary to the effective operation of the employer's business" and that *Wards Cove* made "business necessity" a "misnomer"); *Houghton* v. *SIPCO, Inc.*, 38 F.3d 953, 959 (8th Cir. 1994) (finding "an obvious and significant difference in the plain meaning of" the phrases "business necessity" as used in *Griggs* and "business justification" as used in *Wards Cove*).

In Section 105 of the 1991 Act, Congress amended Title VII to codify the disparate impact analysis and business necessity defense originally enunciated in *Griggs*. The court of appeals correctly concluded that,

in doing so, Congress disapproved the Court's decision in *Wards Cove* to abandon the requirement that employers be required to show that a challenged practice is "necessary" to legitimate business goals, and restored the requirement that the employer make such a showing to defend practices with a disparate impact. First, Congress inserted the term "business necessity" (rather than "business justification") into the text of Title VII. 42 U.S.C. 2000e-2(k)(1)(A)(i). Second, Congress expressly stated that the *Wards Cove* decision (among others) had "weakened the scope and effectiveness of Federal civil rights protections" such that legislation was "necessary to provide additional protections against unlawful discrimination in employment" (Pub. L. No. 102-166, § 2, 105 Stat. 1071), and also stated that it intended to codify the interpretation of "business necessity" as set forth in *Griggs* and before *Wards Cove* (§ 3, 105 Stat. 1071). Thus, the court of appeals correctly concluded that the correct formulation of business necessity under the 1991 Act is to be found in this Court's cases decided before *Wards Cove*, including *Griggs* and *Dothard*.

The court of appeals also correctly concluded (Pet. App. 20a-21a) that the district court had erred in applying the formulation of the business justification defense set forth in *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 587 n.31 (1979). The discussion of business justification in *Beazer* was tangential to that case, which was decided principally on the ground that the plaintiffs had not shown that the challenged ban on current users of methadone had a disparate impact on the basis of race. See *id.* at 584-586. The discussion, moreover, set forth essentially the same formulation as the one eventually adopted by the Court in *Wards Cove* but rejected by Congress in the 1991 Act. See *id.* at 587

n.31 (noting that district court had found that employer's goals "are significantly served by--even if they do not require" the ban against employment of methadone users). As in *Wards Cove*, the Court's opinion in *Beazer* did not even refer to "business necessity," which it had described as the "touchstone" of disparate-impact analysis in *Griggs*, 401 U.S. at 432. Congress's express adoption in the 1991 Act of the term "business necessity" indicates that it intended to disapprove the Court's discussion of the standard for defense of a challenged practice against a disparate-impact claim in *Beazer* as well as in *Wards Cove*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

BILL LANN LEE
Acting Assistant Attorney General

DENNIS J. DIMSEY
ROBERT S. LIBMAN
Attorneys

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